



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Gray v QBE Insurance (Australia) Limited [2015] NSWCATCD 124
Hearing dates:	11 September 2015
Decision date:	15 October 2015
Jurisdiction:	Consumer and Commercial Division
Before:	K Holwell General Member
Decision:	The respondent is to pay the applicant the sum of \$1,797.00 immediately
Catchwords:	Insurance claim limitation periods structural defect major defect
Legislation Cited:	Home Building Act 1989 (NSW), Home Building Amendment Act 2011 (NSW), Home Building Amendment Act 2014 (NSW)
Category:	Principal judgment
Parties:	Matthew Gray (applicant) QBE Insurance (Australia) Limited (respondent)
Representation:	The applicant in person No appearance of the respondent
File Number(s):	HB 15/36771
Publication restriction:	Unrestricted

REASONS FOR DECISION

- 1 By an application filed 8 June 2015 the applicant sought a money order in the sum of \$1,797.00. A slab on which a tank was situated subsided. The tank fell off the slab damaging other property which is covered by insurance. The applicant claims that the construction of the tank stand was not done in a proper and workmanlike manner by the builder of his house. The builder is insolvent and the principal of the building company is deceased. The applicant made a claim on the home warranty insurance policy to have the tank stand fixed. The quote to have the work done is \$2,297.00. There is an excess payable to the insurer re the claim of \$500.00. Hence the claim for

- the balance of \$1,797.00. The insurer has denied liability pursuant to the policy.
- 2 The Tribunal has jurisdiction to hear and determine this application pursuant to the *Home Building Act (1989) NSW*.
- 3 A directions hearing was held on 31 July 2015. There were problems on that day. There was no appearance of the respondent but it was later revealed that the respondent had sent in written submissions. Those submissions were not at the venue and had not been received by the applicant. The case was adjourned to enable the applicant to consider a response to those written submissions. The case was adjourned to 11 September 2015. The respondent relied on the written submissions previously submitted. The applicant gave oral evidence. Thereafter the decision was reserved pending the giving of these reasons. The hearing was sound recorded.
- 4 The applicant had a building contract for a new house in June 2009. The applicant first occupied the house in April 2010 and an occupation certificate was issued on 1 November 2011.
- 5 The applicant became aware of a building defect on 2 February 2015 when the tank stand subsided as referred to above. He made a claim on the insurance policy.
- 6 The respondent engaged a building consultant to assess the claim. The building consultant provided two reports in March and April 2015. The building consultant reported to the respondent in both reports that its opinion was that the claim related to defective work because the builder failed to install the water tank in accordance with the standard but that the claim was out of time because in the opinion of the consultant it was a non-structural defect in accordance with Regulation 71 of the *Home Building Regulation 2004 (NSW)*.
- 7 Reliance on that regulation may be out-dated and it seems that a review of the legislation and vexed parts of it need to be considered.
- 8 Prior to February 2012 the limitation period for claiming about a breach of statutory warranty was seven years from the completion of the building works. This house was completed before February 2012. The applicant would then be entitled to claim against the builder for a breach of statutory warranty within that seven year period subject to consideration of the amending legislation. This limitation period related to both structural and non-structural defects.
- 9 The legislation was amended in 2011 to provide that in respect of building work performed after February 2012 there was a limitation period of six years for structural defects and two years for non-structural defects. The legislation is clear that this amendment did not apply to any contract entered into before 1 February 2012.
- 10 The legislation was further amended in 2014. There is some ambiguity about whether the 2014 amendments retrospectively alter the situation that existed before February 2012. I am of the view that whilst that there may be some retrospective changes to other instances there has been no retrospective change to the time limits in regard to claiming against a builder for breach of statutory warranty. I am satisfied that the

- applicant had seven years from the completion of building work to bring a claim against the builder.
- 11 There is however a change in terminology. “Structural defect” has been replaced in the amending legislation by “major defect”. It appears that whilst before February 2012 a home owner could claim against a builder in respect of any defect, the amending legislation requires in a contract made before February 2012 to determine whether the defect is major or not. Consideration of whether the defect is major or not is therefore retrospective even though the limitation period may be unaffected.
- 12 “Major defect” means (a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these) and that causes or is likely to cause (i) the inability to inhabit or use the building (or part of the building) for its intended purpose or (ii) the destruction of the building or any part of the building or (iii) threat of collapse of the building or any part of the building or (b) a defect of a kind that is described by the regulations as a major defect.
- 13 “Major element” of a building means (a) an internal or external load bearing component of a building that is essential to the stability of the building or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams or (b) a fire safety system or (c) waterproofing or (d) any other element that is prescribed by the regulations as a major element of the building.
- 14 It is common ground that the construction of the tank stand was defective work by the builder. It should have either had better foundations or it should have been fixed to the building wall. It comes within the definition of major element because it is an external load bearing component of any part of the construction. It then comes within the definition of major defect as being a defect in a major element as a consequence of defective design or defective workmanship.
- 15 I am therefore satisfied that the applicant would have succeeded in a claim against the builder. In my view the building consultant’s assessment that this is a non-structural claim is wrong.
- 16 The insurance policy was obviously drafted before the amendments and refers to the old terms of “structural” and “non-structural”. The policy definition of “structural defect” is in the respondent’s material. It confirms that there needs to be the findings of defective design or defective workmanship as outlined above. It goes on to say that these issues have to result in various outcomes. I am satisfied that the defective design and the defective workmanship have resulted in the prevention of practical use of part of the building. Therefore I am satisfied that the applicant is covered by the policy and the respondent is liable to him.
- 17 The only evidence of the quantum of the claim is that provided by the applicant and there will be an order in the amount claimed.

K Holwell

General Member

Civil and Administrative Tribunal of New South Wales

15 October 2015

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated: 16 December 2015